APPEAL NO. 020153
FILED MARCH 6, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 8, 2002. The hearing officer resolved the disputed issues by deciding that the first certification of maximum medical improvement (MMI) and impairment rating (IR) assigned by Dr. F on July 21, 1999, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) and that the appellant (claimant) reached MMI on July 21, 1999, with a zero percent IR as certified by Dr. F. The claimant appealed and the respondent (self-insured) responded.

DECISION

Reversed and rendered.

The claimant sustained a compensable injury on _____, and initially treated with Dr. F, who reported on July 21, 1999, that the claimant reached MMI on July 21, 1999, with a zero percent IR.

The original version of Rule 130.5(e), effective January 25, 1991, which is the version of Rule 130.5(e) that applies to this case, provided:

> The first [IR] assigned to an employee is considered final if the rating is not disputed within 90 days after the rating is assigned.

The hearing officer determined that the claimant did not dispute Dr. F's certification of MMI and IR within 90 days of first knowing of the IR and thus the MMI date and IR assigned by Dr. F became final under Rule 130.5(e).

In Fulton v. Associated Indemnity Corporation, 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied), the court determined that the original version of Rule 130.5(e), the 90-day rule, which restricted the time period for disputing an IR, implicitly limited a claimant's time period for revisiting the assessment of MMI, because when the IR became final, so did the determination of MMI. The court held that the original version of Rule 130.5(e) is invalid because Section 401.011(30) establishes a 104-week period for a worker to achieve MMI and the Commission may not, by rule, shorten that statutory time period because to do so would impose restrictions in excess of those imposed by the 1989 Act. The court held that Rule 130.5(e) imposed on Fulton a restriction in excess of that found in the plain language of the 1989 Act and that Fulton's MMI certification and IR did not become final.

In Texas Workers' Compensation Commission Appeal No. 013201-s, decided February 21, 2002, the Appeals Panel applied the Fulton decision to a case involving the original version of Rule 130.5(e) and rendered a decision that the first certification of MMI and IR did not become final (the Fulton decision has also been applied to the amended

version of Rule 130.5(e) in Texas Workers' Compensation Commission Appeal No. 020014-s, decided February 26, 2002). Accordingly, we apply the Fulton decision to the instant case. We reverse the hearing officer's decision that the first certification of MMI and IR assigned by Dr. F on July 21, 1999, became final under Rule 130.5(e) and we render a decision that Dr. F's certification of MMI and IR did not become final. Since the hearing officer's determinations that the claimant reached MMI on July 21, 1999, with a zero percent IR are based on his decision that Dr. F's certification of MMI and IR became final under Rule 130.5(e), which decision we are reversing, we also reverse the hearing officer's determinations that the claimant reached MMI on July 21, 1999, with a zero percent IR. Since there is presently a dispute regarding the claimant's MMI date and IR, and it does not appear from the record that a designated doctor has been appointed (*see* Section 408.122(c) and 408.125), a designated doctor should be appointed to determine MMI and IR.

We decline the self-insured's alternative request in its response urging affirmance to remand the case to the hearing officer to determine if the claimant disputed the first certification of MMI and IR within a "reasonable amount of time" because that was not an issue and because the self-insured cites no statutory or rule authority for applying such a standard.

The hearing officer's determinations that the first certification of MMI and IR assigned by Dr. F on July 21, 1999, became final under Rule 130.5(e); that the claimant's date of MMI is July 21, 1999; and that the claimant's IR is zero percent are reversed and a new decision is rendered that the first certification of MMI and IR assigned by Dr. F did not become final. A designated doctor should be appointed to determine MMI and IR.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

MANAGER
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

Robert W. Potts
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Philip F. O'Neill
Appeals Judge